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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **DWAYNE KEYONN SWEARINGTON,** **Defendant and Appellant.**	**A091745** **(San Mateo County Super. Ct. No. SC45966)**

Dwayne Keyonn Swearington (Swearington) appeals from a judgment of conviction and sentence after a jury found him guilty of oral copulation on a child under the age of 14 (Pen. Code, § 288a, subd. (c)(1))[1] and lewd or lascivious touching of a child under the age of 14 (§ 288, subd. (a)). He contends his due process rights were violated because the trial court excluded evidence relating to his minor victim's credibility, admitted evidence under Evidence Code section 1108 that he had previously molested his step-daughter, and instructed the jury in accordance with CALJIC No. 2.50.01. He also contends the prosecutor's comments during closing argument deprived him of his right to a fair trial and impartial jury, and his trial counsel's failure to assert objections deprived him of his right to the effective assistance of counsel. We disagree and affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Swearington was charged by information with six felony offenses: counts 1 through 3, committing a lewd or lascivious act upon a child under the age of 14, between

May 9 and August 3, 1999 (§ 288, subd. (a)); count 4, committing an act of oral copulation upon a child under the age of 14, during that same time period (§ 288a, subd. (c)(1)); count 5, committing an act of oral copulation upon a child under the age of 14 on or about August 3, 1999 (§ 288a, subd. (c)(1)); and count 6, lewd and lascivious touching by penetration of the victim's vagina with his penis, between May 9 and August 3, 1999 (§ 288, subd. (a)). In addition, the information alleged that Swearington had previously been convicted of violating section 288, subdivision (a), within the meaning of sections 1203.066, subdivision (a)(5), 667.61, subdivision (d)(1), and 1170.12, subdivision (c)(1).

Trial of the prior conviction was bifurcated. A jury trial was held on the substantive charges, and a court trial later took place as to the prior conviction.

A. PROSECUTION CASE

The victim's mother, Cynthia Flores (Flores), met Swearington in April 1999 and they began to date two or three times a week. According to Flores, by late May 1999, they were discussing marriage.

Between May and August 1999, Flores and her then seven-year-old daughter, Raquel M. (Raquel), frequently stayed overnight at Swearington's one-bedroom apartment, where he lived with his son, Keyonn, Jr. Typically, Swearington and his son slept in a bed, while Flores and Raquel slept on a futon in the same room. Although Raquel initially told her mother she thought Swearington was very nice, her attitude toward him appeared to change around mid-July.

On August 2, 1999, Flores and Raquel were at Swearington's apartment with Swearington and Keyonn, Jr. Raquel was sent to bed after dinner, as punishment for being "snappy" and moody. She was placed on the futon in the bedroom, and Keyonn, Jr., slept on the bed. Raquel was wearing a T-shirt, panties, and boxer shorts. After Flores left the bedroom, she heard Swearington cursing because Raquel would not talk to him. Flores returned to the bedroom to punish Raquel, but she became concerned and

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1 Unless otherwise indicated, all further section references are to the Penal Code.

upset when Raquel said she felt like killing herself. Flores comforted her and went back to the living room, where she and Swearington smoked marijuana.

Flores fell asleep in the living room at about 11:30 p.m. At approximately 1:00 or 1:30 a.m., she awoke and noticed Swearington was no longer in the room. She walked toward the bedroom door, which was partially closed, and pushed it open. Flores observed Swearington on his knees, leaning over the edge of the futon where Raquel was sleeping. Raquel was lying on her back, and her legs were spread open. Swearington's left hand was on Raquel's inner thigh, below her vagina, and his face was in her vaginal area, moving back and forth. Flores could not see Swearington's right hand. Shocked, Flores asked Swearington what he was doing. He did not respond, and his head continued to move back and forth. When Flores repeated her question, Swearington stood up quickly. She observed that Raquel's panties and boxer shorts were shifted to the side, exposing her vagina. Swearington claimed he was giving Raquel a kiss good night, to which Flores replied, "giving her a kiss where?" Swearington did not respond, and instead went into the bathroom. Flores had not seen him touch Raquel in an inappropriate way on any other occasion.

Flores believed Raquel was only pretending to be asleep, because she was tightly closing her eyes. She laid down by her daughter and asked if she was awake. Raquel responded she was asleep. Flores asked Raquel whether Swearington gave her a goodnight kiss, and Raquel replied "no." Swearington returned to the bedroom, sat on his bed, and asked Flores to lay down with him or give him a kiss, but Flores told him, "you get the hell away from me." Expressing concern about losing his son if the police were involved, Swearington rubbed his son's head and said the boy was all he had.

Flores and Swearington continued to discuss their relationship while in the living room. Flores was angry about what Swearington had done to Raquel and frightened about what he might do next, as Swearington appeared nervous. When the two returned to the bedroom, Flores asked him why he did what he did, and Swearington "jumped up mad" and said, "what do you think I was doing[,] eating her pussy or something?" Flores then laid down with Raquel and may have fallen asleep for a few hours.

Flores remained at the apartment overnight, afraid Swearington would hurt her or Raquel if they left and gave him the impression they were going directly to the police. She also did not want to frighten Raquel or arrive at her sister's house in the middle of the night. Around 6:30 that morning (August 3), Flores and Raquel left the apartment before Swearington and his son awoke. Flores told her daughter that they were leaving and "never coming back." Flores dropped Raquel off at her grandmother's and telephoned a friend, Tina Pelayo, in whom she confided about the molestation. Pelayo instructed Flores to take Raquel to Santa Clara Valley Medical Center, which had a SAFE (Sexual Abuse Forensic Examination) program for children. Flores did so the next day (August 4), but no examination was conducted when it was determined that the incident took place in San Mateo County. While at the Santa Clara Valley Medical Center, Raquel admitted to Flores that she had been awake and Swearington "was licking me down there." Flores drove to the East Palo Alto Police Department and reported the matter to the police.

On August 5, Flores took Raquel to San Mateo County General Hospital's SAFE Center, where she was examined by Dr. Hilda Dudum. Dr. Dudum testified that Raquel's hymen appeared normal, but concluded her finding was consistent with oral copulation, since physical signs are unlikely if the oral copulation occurred 48 hours earlier and vaginal penetration was slight. Dr. Dudum agreed on cross-examination that the results were also consistent with oral copulation not having occurred.

1. Raquel's SAFE Interview and Trial Testimony

Raquel's SAFE interview was videotaped and played for the jury. In the interview, Raquel revealed that Swearington had touched her inappropriately several other times during the three months she and her mother stayed at his apartment. On these occasions, he had touched her breasts and buttocks, reached under her clothing and touched her vagina, orally copulated her, and penetrated her vagina with his penis. Swearington also touched and licked her vagina once while Flores was out jogging.

In the videotape, Raquel described the incident of August 3, explaining that at the time she was sleeping on her back on the futon, Keyonn, Jr., was on the other bed, and

her mother was in another part of the apartment. When Swearington licked her vagina, Raquel was awakened. It bothered her, so she kicked him. He stopped, but then started doing it again. When Flores entered the room she started arguing with Swearington, yelling at him to "get the h-e-l-l away from me."

Raquel also described an earlier act of sexual intercourse in the videotaped interview, which occurred when she was wearing her purple heart dress. On this occasion, Swearington pulled off her panties, laid on top of her, and "put his penis inside" her "second hole." She felt his penis "pushing hard" on her, and felt it inside her; it was uncomfortable. She kicked him three times. After he put his penis inside her, "there was white stuff," which was "[w]et and cold" and "[s]limy." The "white stuff" was up to her knee and "a little bit on the bed."

Raquel also described other molestations in more general terms. For instance, she said that Swearington put his penis on her buttocks while she was lying on her stomach. On another occasion, he touched Raquel's vagina when she was lying on the sofa and Flores was in the bedroom.

At trial, Raquel recalled she was wearing boxers, panties, and a T-shirt when she went to bed on the occasion that Swearington licked her vagina and, although she kept her eyes closed, she was "peeking" while he was "licking" her.

2. Swearington's Previous Molestation of His Step-Daughter Jessica

Jessica T. (Jessica), aged 11 at the time of trial, testified she previously lived with Swearington and her mother, Tiffany Ervin (Tiffany), who were married for about three years beginning when Jessica was six years old. While Tiffany worked, Swearington babysat Jessica and his son, Keyonn, Jr. Between four and six times, Swearington called Jessica into the bedroom and told her to take off her clothes and get on the bed and spread her legs open. On these occasions, he penetrated her vagina with his penis or instructed her to touch his penis, ignoring Jessica's requests to stop. Jessica complied with his instructions because she was afraid. Swearington admonished her not to tell anybody about the molestation, which stopped when she turned seven.

After Tiffany and Swearington divorced, Jessica told her mother something about what had happened, but she did not tell her all of it because Tiffany "was in a bad position at that time, and [Jessica] didn't want to hurt her anymore than she already was." Tiffany, who was having psychological problems, did not report the molestation to the authorities. Later, after Jessica began living with her father, she confided these incidents to her stepmother.

B. DEFENSE CASE

Swearington testified he met Flores around May 1999, describing her as a "typical party animal." When she pushed him towards marriage in late June 1999, he expressed his lack of interest and advised Flores that he did not want her or Raquel at his residence as much. Swearington added that his son, Keyonn, Jr., and Raquel clashed with one another.

Swearington characterized Raquel's charges of oral copulation as "definitely false." When confronted by Flores on the morning of August 3, Swearington told her he was kissing Raquel good night. When arrested and questioned by the police, he denied orally copulating Raquel, but claimed "something was wrong because ain't no little old kid should have so a foul odor in her underwear like that." His son had previously found Raquel's soiled panties on the bathroom floor, and Swearington described her underwear as wet, brown, and "stunk like feet." He exclaimed "ain't no way I would have put my mouth on some nasty shit like that."

Swearington denied any lewd and lascivious touching of Jessica, claiming he pled no contest to a violation of section 288, subdivision (a) involving Jessica only because he faced a sentence of 85 years in the penitentiary and he wanted to be immediately released from jail to be reunited with his son. Swearington added that his "lawyer ran out" and "left [him] hanging," although acknowledging that his lawyer was present when he entered the change of plea.

Jessica's mother, Tiffany, was married to Swearington between 1994 and 1997. In April 1997, Jessica told her that appellant had touched her in the vaginal area. However,

Tiffany did not believe Jessica at the time, since she observed no dramatic change in her behavior and showed no signs of fear.

Keyonn, Jr., appellant's son, testified that he never saw his father "bad touch" Raquel.

C. VERDICT AND SENTENCE

The jury found Swearington guilty on count 5 (oral copulation, which Flores witnessed) and count 6 (penetration of Raquel's vagina, when no one else was present), but reached not guilty verdicts as to counts 1 through 4. Appellant waived his right to jury trial on the prior conviction allegations, and the court found them to be true.

Swearington was sentenced to the Department of Corrections as follows: the upper term of eight years on count 5, doubled to sixteen years pursuant to section 1170.12, subdivision (c)(1), followed by a five-year enhancement under section 667.61, subd. (d)(1); and a consecutive term of 25 years to life on count 6 pursuant to section 667.61.

This appeal followed.

II. DISCUSSION

We examine appellant's various arguments in turn.

A. EXCLUSION OF EVIDENCE PERTAINING TO RAQUEL'S CREDIBILITY

Swearington first maintains that the trial court violated his due process right to present a defense by excluding evidence of Raquel's credibility: (1) testimony that Raquel had boasted in first grade that she had sex with a classmate and was pregnant, and (2) evidence that Raquel had accused a parent volunteer at school of touching her vagina. Swearington contends this evidence showed Raquel was capable of fantasizing about sexual matters or incapable of distinguishing between appropriate and inappropriate touching, and also supported his defense that Raquel fabricated the allegations against him.

1. Claim of Sex with a First Grade Classmate

By in limine motion under Evidence Code section 780, Swearington sought to introduce the testimony of Raquel's first grade teacher, Ms. Eddings, to the effect that in

first grade Raquel claimed to have had sex with classmate Andrew M. on the roof, in a classroom, and elsewhere, and that she was pregnant with his baby.[2] At a hearing outside the jury's presence, Raquel denied making the statement.

Ruling the proffered evidence inadmissible, the court found the information irrelevant, "riddled with hearsay," and untrustworthy, and expressed concern there would be a mini-trial regarding what Raquel had said and meant.[3] Aware of Swearington's desire to establish Raquel's knowledge of sexual matters, independent from any contact with him, the court suggested that defense counsel elicit such evidence through more direct inquiries of Raquel.

We are not persuaded that Raquel's apparent statement regarding sex and pregnancy was necessarily irrelevant or inadmissible hearsay. The statement could have some bearing upon Raquel's credibility in that it suggests a capacity for fabricating sexual events. Although an out-of-court statement, it was not offered for its truth (i.e. that Raquel had sex with her first grade classmate and became pregnant), but rather to show she was capable of fantasizing about sexual matters, and had made a false statement concerning that topic.

We nevertheless conclude that the trial court did not abuse its discretion in rejecting this evidence under Evidence Code section 352, which reads: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In reviewing a trial court's ruling under Evidence Code section 352 for an abuse of

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[2] Under Evidence Code section 780, the trier of fact may consider any matter tending to prove or disprove a witness's truthfulness, except as otherwise provided by statute. Evidence Code section 782 sets forth the procedure where evidence of sexual conduct of the complaining witness is offered in a prosecution under, e.g., section 288.

[3] The court made these comments in regard to evidence of Raquel's first grade and second grade "notes." It appears from the record that this category of evidence included Raquel's claim of intercourse while in the first grade, as well as a sexually explicit note

discretion, we will not disturb the ruling unless it is shown that the court exercised its discretion in "'"an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'"" (*People v. Jones* (1998) 17 Cal.4th 279, 304; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

While the proffered evidence may have had some potential relevance, it was not unreasonable for the court to find that its probative value was outweighed by the danger of confusing the jury and the undue consumption of time. On this point we find an excerpt of the trial court's Evidence Code section 352 analysis illuminating: "We would have a mini trial regarding what was said, what it meant, who reported it to whom, [and] what were the conversations" between Raquel and others on this topic.

The court also pointed out that, even if the evidence could be construed as relevant to explain Raquel's ability to describe the acts of which she accused Swearington, there were other ways the defense could elicit—and did elicit—evidence of her sexual knowledge. For instance, defense counsel examined Flores as to her discussions with her daughter concerning the "birds and the bees" and the difference between a "good touch" and a "bad touch." He asked her specifically how she would describe Raquel's knowledge of sex or sexual activity and whether her daughter ever used words that were sexual in nature or "acted out" sexually. Defense counsel also could have directly asked Raquel about her sexual knowledge, as the trial court suggested, but apparently elected not to do so in his examination of this witness in the presence of the jury, even though Raquel demonstrated no reluctance in testifying about such matters during the Evidence Code section 402 evidentiary hearing (402 hearing).

At bottom, the record demonstrates that the trial court conscientiously engaged in the balancing determination Evidence Code section 352 requires. Its ruling reveals a weighing of the probative value of the proffered evidence and the risk of confusing the issues and unduly consuming time. No abuse of discretion appears on this record.

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she allegedly penned while in second grade. Swearington does not directly challenge the exclusion of the second grade note.

2. Accusation Against Diaz

Swearington also sought to admit evidence that Raquel falsely accused a parent who volunteered at her school, Marvin Diaz, of touching her vagina while tutoring her in reading. In his written offer of proof, Swearington listed: a police report reciting Raquel's description of how Diaz purportedly touched her; a police report reciting Raquel's statement that a classmate, Aliena M., told her Diaz had touched her inappropriately as well, and a statement by Aliena M. that she made no such allegation; Diaz's denial of Raquel's accusation; and testimony of Raquel's teacher at the time of the alleged touching, Lori Mongiello, who would offer that she did not witness any act of molestation and that she did not believe the allegations. At the 402 hearing, Raquel testified that Diaz placed his fist on her back and touched her below her belly button, on her upper thigh near her hip, and she told police that she thought he should go to jail for 30 years for touching her. She did not testify (nor was she asked directly) that Diaz touched her vagina.

The trial court did *not* find all evidence concerning Raquel's accusation against Diaz was inadmissible, but concluded that Diaz's testimony—which would presumably evince the falsity of the allegation—was relevant to Raquel's credibility, not unduly time consuming, and not likely to be unduly prejudicial. In ruling that it would "admit testimony with regard to the Diaz incident with some carefully delineated parameters," the court indicated it would permit Diaz's testimony concerning the falsity of Raquel's allegation subject to his impeachment with four prior convictions of section 288, subdivision (a). Further, Ms. Mongiello would be allowed to offer her personal observations, but she could not express her opinion that Raquel's account was unbelievable. Finally, the court carefully dictated the order of proof: "I want to be very clear that this Court is going to require the most prudent order of proof which means that until we have Mr. Diaz present, bodily in this courtroom, and we have a short preliminary hearing where the Court can admonish him about his ability, admonish him about his Fifth Amendment rights, he exercises those rights or indicates that he will or will not testify, no mention can be made about the Diaz incident. [¶] That means that when the

current witness [Flores] retakes the stand, she may not be questioned about the Diaz incident because the foundational facts have not been laid. . . . So the order of proof will be that the defense must lay the foundational elements before the Diaz incident comes into play."[4]

When Diaz appeared at court, he invoked his Fifth Amendment right to remain silent, and thus the defense was unable to produce evidence of the falsity of Raquel's accusations. Swearington insists the trial court erred in excluding such evidence, because it tended to show that Raquel was fabricating or incapable of distinguishing between appropriate and inappropriate touching. He also claims there was evidence suggesting Raquel might have made the accusation against Diaz because she did not like Diaz's son, which would support Swearington's defense that Raquel made false allegations against him because she disliked Keyonn, Jr. Neither we, nor the trial court, disagree that this evidence had some probative value. The question is whether the trial court erred in directing the order of proof as it did. Swearington ignores this issue.

Under Evidence Code section 320, a trial court has discretion in regulating the order of proof at trial. As to the testimony surrounding Raquel's accusations against Diaz, the trial court's regulation of the order of proof was eminently reasonable. Unless Diaz denied the accusation, there would be no evidence before the jury that the accusation was in fact false. Instead, the jury would learn that Raquel had accused someone besides Swearington of molesting her and that Ms. Mongiello did not witness Diaz perform any act of molestation, leaving it for the jurors to speculate as to the validity of the accusation. Whatever slight probative value this evidence would have was substantially outweighed by its potential for undue prejudice and confusion of the issues.

We also find the cases on which Swearington relies to be inapposite and unhelpful to our analysis. (*Davis v. Alaska* (1974) 415 U.S. 308 (*Davis*); *Redmond v. Kingston* (7th

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[4] In addition, the court declined to accept evidence of the fact that charges had not been filed against Diaz involving his alleged touching of Raquel, and that Diaz had extracted some form of an apology from his accuser. Swearington does not challenge those rulings.

Cir. 2001) 240 F.3d 590 (*Redmond*); *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270 (*Franklin*).) In *Davis*, the defendant, on trial for grand larceny and burglary, sought to introduce evidence of the juvenile record of a critical prosecution witness. The defense claimed the witness's probationary status as a juvenile delinquent subjected him to undue pressure from the police, leading to a faulty pretrial identification of the defendant and a tainting of the witness's in-court identification. The Supreme Court held that the Sixth Amendment right to confront witnesses required that Davis be allowed to challenge the witness with evidence of a possible motive for his alleged misidentification. (*Davis, supra,* at p. 317.) In *Redmond*, the defendant was accused of statutory rape. Eleven months before the purported offense, the complaining witness had told her mother that she had been forcibly raped by someone else, but later admitted she had made the story up in order to gain her mother's attention. The defendant sought to bring out the false accusation on cross-examination to demonstrate that the complaining witness had "a motive for what would otherwise be an unusual fabrication." (*Redmond, supra,* at pp. 591-592.) The trial court precluded examination on this topic, but the appellate court ruled it was a violation of the confrontation doctrine to do so. (*Ibid.*) Finally, in *Franklin*, the defendant was charged with molesting the minor victim. To attack her credibility, the defendant attempted to introduce evidence that, on the previous night, the minor had told her two brothers that her mother had come into her room and "licked her private." The trial court found the evidence inadmissible under California Evidence Code section 782. Both the California Court of Appeal and a federal appeals court disagreed, finding the minor's statement relevant on the issue of her credibility. In particular, the federal appeals court found the error was of constitutional magnitude, since the excluded evidence had a bearing upon the credibility of the only percipient witness against Franklin in that it showed the minor capable of fantasies which were analogous to the charged offense. (*Franklin, supra,* at p. 1272.)

Both *Davis* and *Redmond* addressed the exclusion of evidence which would tend to offer an explanation or a *motive* for the complaining witnesses' accusations. In the present case, evidence of Raquel's allegation as to Diaz would not provide a motive for

her accusations against Swearington. At best, it would assume the more limited role as but one of a number of factors to be weighed in accessing Raquel's credibility. It is also noteworthy that in *Davis* and *Redmond* the witnesses' probationary status or false allegation was not a matter of dispute, whereas the question of whether Raquel made the accusation against Diaz, and whether it was true, was a matter of considerable dispute to be proved at trial, thus increasing the danger jurors would be distracted or confused. Although *Franklin* involved the exclusion of a prior false allegation on the part of the complaining witness, all of the cases on which Swearington relies, including *Franklin*, implicated the court's refusal to admit the proffered evidence altogether. By contrast, here, the trial court *admitted* Diaz's testimony, subject to a reasonable order of proof. We are unaware of any authority which prevents a trial court from requiring that the proponent of evidence first meet foundation requirements as a condition of admissibility. In this regard, the trial court did not err in its evidentiary rulings or its regulation of the order of proof.

Swearington has not shown any deprivation of his constitutional rights.

B. ADMISSION OF EVIDENCE UNDER EVIDENCE CODE SECTION 1108

Swearington further posits that his due process rights to a fair trial were violated by the admission of evidence that he had previously molested his step-daughter, Jessica. Evidence of this sexual conduct was admitted under two sections of the Evidence Code. As to Evidence Code section 1101, subdivision (b), the court considered the evidence relevant to Swearington's intent, plan, motive, or absence of mistake.[5] Under Evidence Code section 1108, the court found this prior conduct to be evidence of Swearington's commission of another sexual offense and admissible under Evidence Code section 352.[6]

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[5] Evidence Code section 1101, subdivision (b) reads: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

[6] Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's

Swearington does not dispute that the elements of Evidence Code section 1101, subdivision (b) were met, or that the prior molestation was a sexual offense within the meaning of Evidence Code section 1108. Instead, he argues that the court abused its discretion in admitting the evidence because its prejudicial effect outweighed its probative value. (Evid. Code, § 352.) We also review the trial court's determination on this issue for an abuse of discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.)

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), our Supreme Court set forth various factors for a trial court to consider in determining whether evidence of a prior offense may be admitted under an Evidence Code section 352 analysis: (1) its nature, relevance, and remoteness; (2) the certainty of its commission; (3) the likelihood of confusing, misleading, or distracting the jury; (4) the similarity between the prior offense and the charged offense; (5) the likely prejudicial impact; (6) the burden on the defendant in rebutting the prior offense; and (7) the availability of less prejudicial alternatives. (*Falsetta, supra,* at p. 917; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-406 [Evid. Code, § 1101, subd. (b)]; *Harris, supra,* 60 Cal.App.4th at pp. 737-741 [under Evid. Code, § 1108, the probative value of the evidence must also be balanced against the inflammatory nature of the prior conduct, possible confusion of issues, remoteness of the prior offense, and time needed to introduce and refute the prior offense].)

Whether considered collectively or individually, a weighing of the foregoing factors favor the admission of Swearington's prior sexual conduct. For example, the prior and charged offenses revealed a common scheme or plan, and was highly probative as to the identity and intent of the perpetrator. (Evid. Code, § 1101, subd. (b).) This evidence was relevant to establish a pattern of Swearington's molestation of the young daughters of women with whom he was romantically involved: six-year-old Jessica was

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commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

molested shortly after she and her mother, Tiffany, moved into his residence, and seven-year-old Raquel was molested within months after she and her mother started staying overnight at appellant's residence. Such evidence tended to refute Swearington's claims that he did not touch Raquel with a lewd intent or that Raquel may have mistook eight-year-old Keyonn, Jr.'s, touching for that of his. Further, its probative value was enhanced by the fact that its source—Jessica—was independent of the evidence of the charged offense—Raquel and Flores. (See *Ewoldt, supra*, 7 Cal.4th at p. 404.)

Prior sexual conduct, of course, may have less probative weight if it is *remote* in time. Here, however, it cannot be said that this factor favors exclusion, since the molestation of Jessica was of recent vintage, occurring approximately five years before the commission of the charged offenses. (See *Ewoldt, supra,* 7 Cal.4th at p. 405 [offense 12 years earlier was not excessively remote]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393-1395 [offenses occurring 15-22 years before trial were not too remote in light of similarity to charged offense].)

Although relevant, evidence may be excluded if its probative value is outweighed by the probability that its admission will create a substantial danger of *confusing the issues*. *Ewoldt* addressed the question of confusion of issues in the context of whether the defendant had been convicted of the prior conduct. (*Ewoldt, supra,* 7 Cal.4th at p. 405.) *Harris* adopted this approach. (*Harris, supra,* 60 Cal.App.4th at pp. 738-739.) As the court in *Ewoldt* explained: "the prejudicial effect of this evidence is heightened by the circumstance that defendant's uncharged acts did not result in criminal convictions. This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of "'confusing the issues'" (Evid. Code, § 352), because the jury had to determine whether the uncharged offenses had occurred." (*Ewoldt, supra*, at p. 405.) Here, there was little likelihood that admitting testimony of the uncharged sexual conduct would lead to a confusion of the issues. The jury was certainly well aware of its limited purposes, as it was several times admonished and instructed on this subject. That Swearington had already pled no contest and been

punished for the uncharged offense became abundantly clear to the jury by reason of appellant's testimony to that effect. Swearington's denial of the very conduct that gave rise to this conviction did not heighten the potential for confusion and prejudice, but merely presented a conflict in the evidence, which the jurors were required to resolve. (*Ewoldt*, *supra*, at p. 405; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315; *Harris, supra,* at pp. 738-739.) This record does not support a finding that the jury was confused by the introduction of the uncharged sexual conduct.

Nor do we find evidence of the prior offense more *inflammatory* than the charged offense. As we have written *ante*, Jessica's molestation was similar to that of Raquel. Both involved lewd conduct with a young girl, as Swearington engaged in sexual intercourse with six-year-old Jessica shortly after marrying her mother, Tiffany, and engaged in sexual intercourse and oral copulation with seven-year-old Raquel shortly after becoming romantically involved with her mother, Flores. Testimony describing appellant's uncharged acts involving the unlawful touching and sexual intercourse of Jessica were no stronger and no more inflammatory than was his sexual intercourse and oral copulation of Raquel. Thus, the potential for prejudice, or the likelihood that Swearington was convicted as the result of the jury's passions being inflamed by evidence of Jessica's molestation, was very unlikely.

Swearington argues that the prior molestation was more inflammatory than the offenses for which he was tried, because Jessica testified clearly, while Raquel's testimony was often vague. However, Raquel's testimony may only be characterized as "vague" as to those charges on which the jury did not convict. She was very specific and clear in her description of the events surrounding count 5 (oral copulation) and count 6 (sexual intercourse), on which the jury did convict. For example, as to the fifth count, Raquel stated in the videotaped interview that she was sleeping on her back, Keyonn, Jr., was on the other bed, and her mother was elsewhere. She awoke to find Swearington licking her vagina, she kicked him, he stopped, and then he started again. At trial Raquel recalled wearing boxers, panties, and a T-shirt that night and, although she had her eyes closed, she "peek[ed]" while he was "licking" her. As to the sixth count, her videotaped

interview disclosed that on an occasion when Raquel was wearing her purple heart dress, Swearington pulled off her panties, laid on top of her, and "put his penis inside" her "second hole." She felt his penis "pushing hard," and it was uncomfortable. After he put his penis inside her, "there was white stuff," which was "[w]et and cold" and "[s]limy," extending up to her knee with "a little bit on the bed." Raquel's recall of these incidents was hardly "vague."

Other factors bearing on *Falsetta's* Evidence Code section 352 analysis favor admission of the evidence as well. Swearington's *burden in defending* against the prior uncharged offense was not substantial, as demonstrated by defense counsel's cross-examination of Jessica, the fact that he offered Tiffany as a defense witness, and he offered to the jury some explanation for Jessica's accusation. In particular, Swearington testified he did not touch Jessica in a lewd or lascivious manner, explaining he pled no contest to violating section 288, subdivision (a) only because his lawyer deserted him and he wanted to be reunited with his son rather than face 85 years in prison. From Tiffany he elicited testimony that she had *doubted* Jessica's allegation, since Jessica displayed no fear of Swearington or any dramatic behavioral change.[7] It is probable that any difficulty appellant may have experienced in rebutting evidence of the prior uncharged offense occurred because he suffered a conviction of this offense, a circumstance which would have come to the jury's attention through impeachment in any event. (Evid. Code, § 788.)[8] Finally, we note that Swearington suggests *no less prejudicial alternative* to admitting the evidence, and did not propose such an alternative to the trial court.

Swearington cites *Harris, supra,* 60 Cal.App.4th 727 as authority for his argument that the trial court abused its discretion by failing to exercise the safeguard (Evid. Code, § 352) against the use of uncharged sex offenses in cases where the evidence could result in a fundamentally unfair trial. His reliance on *Harris* is misplaced. There, the defendant

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[7] In addition, Swearington's counsel suggested to the jury that Tiffany told Jessica to make up the molestation story against Swearington so he would not obtain custody.

[8] The court instructed the jury that a witness's prior conviction of a felony is a factor in determining the believability of a witness. (CALJIC No. 2.20.)

was charged with using his position of trust as a mental health nurse to engage in sex with two women who were vulnerable due to their mental condition. The offenses were committed without any show of force, use of weapon, or infliction of physical injury. (*Harris*, *supra*, at pp. 730-732.) The trial court admitted a prior offense under Evidence Code section 1108, which portrayed the brutal rape of a stranger, occurring 23 years earlier, in which Harris allegedly beat and stabbed his victim. Harris's role in the attack went largely unexplained, as the jury was only informed that he was convicted of burglary with the infliction of great bodily injury. (*Harris*, *supra*, at p. 733.) The appellate court found the prior sexual offense was "inflammatory in the extreme" and improperly admitted in evidence. The court's decision stressed the dissimilarities between the prior and charged offenses, the length of time between the commission of the two offenses, the potential for jury confusion in having to determine whether the uncharged offense in fact occurred, and the potential that the defendant would be punished for the prior offense whether or not the jury believed he had committed the current offenses. (*Harris*, *supra*, at pp. 738-741.)

There exists virtually no similarity between the facts in *Harris* and those of the instant case. In the matter before us the prior and current offenses are extremely similar, the prior offense was committed within five years of the present offense, and the prior offense was not only previously charged, but was the subject of a no contest plea and punishment.

Swearington nevertheless persists that the prejudicial impact from admitting evidence of the incident involving Jessica was enhanced because the prosecutor placed undue emphasis upon it. In his opening statement, the prosecutor certainly introduced the topic and described Jessica's likely testimony. During closing argument, he informed the jury that, if it believed the prior offense had occurred, it could consider such evidence as proof of a common plan, as well as proof that Swearington had a disposition to commit the same or similar type of sexual offense. The prosecutor stated: "And you heard testimony from Jessica for two reasons in the law. One, to show what's called a common scheme, a plan that the defendant engaged in, that is seeking out single mothers who have

small young daughters, their father's [*sic*] are out of the picture, and then he moves in and he brings them close, and he marries them or he moves in with them or he has them coming over to his house on consecutive nights several times a week. [¶] Very close relationships. And he places himself in proximity to these small girls. Because in order to do a molestation you have to have physical proximity, you have to bring the child to you, and it just so happens that children come with parents, come with mothers or fathers. [¶] The second reason you have heard testimony from Jessica is because you can consider it for what is defined in the instructions and the law as disposition evidence. Whether the defendant had a disposition to commit the crime against Raquel from what he did to Jessica, and it's a little bit tricky. I would encourage you to read the instruction again in the jury room. [¶] . . . [¶] If you believe based on all the evidence you heard about the Fresno acts by a preponderance, then you can consider that evidence as showing the defendant had a disposition to commit the acts against Raquel, but all the charges, all six charges that we have charged him with here in San Mateo County have to be proved beyond a reasonable doubt."

The prosecutor's comments did not urge the jury to place undue weight on the other crimes evidence. Nor were they an incorrect statement of the law under CALJIC Nos. 2.50 and 2.50.01.

Finally, Swearington argues that the court's admission of the evidence effectively lowered the People's burden of proof, allowing the jury to convict him due to who he was rather than what he did. Our Supreme Court rejected this argument in *Falsetta*, *supra*, ruling that admission of propensity evidence, based on evidence of a prior molestation, adds to the evidence the jury may consider but does not "'lessen the prosecution's burden to prove his guilt beyond a reasonable doubt.'" (*Falsetta*, *supra*, 21 Cal.4th at p. 920.) This analysis applies to the present case.[9]

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[9] In fact, even the prosecutor emphasized the need to find Swearington guilty beyond a reasonable doubt in his closing argument: "If you believe based on all the evidence you heard about the Fresno acts by a preponderance, then you can consider that evidence as showing the defendant had a disposition to commit the acts against Raquel,

Because we find that all of the *Falsetta* factors support the trial court's finding that Evidence Code section 352 did not bar evidence of Swearington's prior molestation of Jessica, evidence of its commission was properly admitted.

C. JURY INSTRUCTION (CALJIC NO. 2.50.01)

The trial court instructed the jury, based on the 1999 revision of CALJIC No. 2.50.01, as follows: "*If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type [of] sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.* [¶] *However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes.* [¶] Every fact necessary to constitute the charged crime must be proved beyond a reasonable doubt. The weight and significance of the evidence, if any, are for you to decide. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose." (Italics added.) The court also instructed the jury on the preponderance of the evidence, in accord with CALJIC No. 2.50.1.

Swearington contends the court's instruction under CALJIC No. 2.50.01 violated his due process rights to a fair trial by permitting the jury to draw an inference of guilt based on propensity evidence admitted under Evidence Code section 1108, thereby undermining the jury's responsibility to determine guilt beyond a reasonable doubt.

1. Waiver

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but all the charges . . . that we have charged him with here in San Mateo County have to be proved *beyond a reasonable doubt*. [¶] Each element that I told you about has to be proved *beyond a reasonable doubt*, so that the Fresno incident can be used by you as a fact helping you determine that the crimes in this case have been proved *beyond a reasonable doubt*." (Italics added.)

Because Swearington did not object to the reading of the instruction, the People argue he is precluded from raising the issue on appeal. We do not address this issue, in light of our ruling on the merits.

2. Jury Instruction

As read by the court, the 1999 revision to CALJIC No. 2.50.01 instructed the jury that it (1) could infer from the defendant's uncharged sexual misconduct that he had the disposition to commit similar offenses, and (2) could infer from this disposition that he was likely to commit, and did commit, the charged crimes. However, the instruction also informs the jurors that this inference is not sufficient in itself to prove beyond a reasonable doubt that the defendant committed the charged crimes: "if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes."

In *People v. Hill* (2001) 86 Cal.App.4th 273, Division One of this court rejected an argument, similar to the one advanced by Swearington, that CALJIC No. 2.50.01 violated his due process rights. There, given the language of CALJIC No. 2.50 and the 1999 revision to CALJIC No. 2.50.01, the court found "no reasonable likelihood" that the jury convicted the defendant solely because it found he had committed the prior uncharged offenses. (*Hill, supra*, at pp. 276, 278-279; see also *People v. Brown* (2000) 77 Cal.App.4th 1324.) We also point out that the 1999 version of CALJIC No. 2.50.01 has been endorsed by our Supreme Court in *Falsetta*, *supra*, 21 Cal.4th at p. 924. (*Hill, supra*, at p. 277.)

Swearington suggests the "instructional circumstances here were different" than in *Hill* and *Brown*, pointing out that in *Hill* the court modified CALJIC No. 2.50.1 to caution the jury that each element of the offense had to be proven beyond a reasonable doubt, and that the evidence against him was less persuasive than in *Hill*. (*Hill*, *supra*, 86 Cal.App.4th at pp. 278-279.) Appellant's argument is unpersuasive because, in the matter before us, the court also instructed the jury that the People have "the burden of proving him guilty beyond a reasonable doubt," and that "[e]very fact necessary to

constitute the charged crimes must be proved beyond a reasonable doubt." (See CALJIC Nos. 2.01, 2.90.) Thus, we find there is no reasonable likelihood he was found guilty solely based upon the court's admission of other crimes evidence.

D. PROSECUTORIAL COMMENTS IN CLOSING ARGUMENT

Swearington next claims that the prosecutor impermissibly commented on his failure to present more favorable testimony by his son after Keyonn, Jr., invoked his Fifth Amendment privilege against self-incrimination. This, Swearington argues, deprived him of his due process right to a fair trial and an impartial jury.

Before trial, the defense sought permission to elicit testimony from Keyonn, Jr., to the effect that he had sexual contact with Raquel to show that such contact was the basis of her knowledge of the sexual acts she attributed to Swearington, as well as motivation for her accusation. The court ruled it would permit such testimony and appointed an attorney to represent Keyonn, Jr.

Defense counsel's opening statement referenced the anticipated testimony: "Keyonn Junior . . . will tell you first of all that certainly he never saw his father do anything inappropriate with Raquel, and second of all, that actually he at some point had some sexual contact with Raquel when they were alone." When it came time to testify about his "sexual contact with Raquel," however, Keyonn, Jr., invoked his Fifth Amendment right not to answer questions concerning this subject. As a result, his testimony was somewhat limited, offering instead that Flores was his father's friend and she and her daughter Raquel frequently spent the night; that on the evening of August 2, 1999, he and Raquel went to bed and, hours later, he awoke and heard Flores and his father arguing; and that he never saw his father "bad touch" Raquel.

In his opening argument, the prosecutor stated: "Keyonn Junior would have been a prosecution witness for what he testified to on the stand because he corroborated everything that our witnesses told you, and under the circumstances where you would expect him not to do that. That makes him that much more of a significant witness."

Defense counsel avoided mentioning Keyonn, Jr.'s, testimony in his closing argument. Toward the end of his rebuttal argument, the prosecutor stated: "Now the

defense didn't even mention little Keyonn Junior to you, didn't say a word about him. And I suggest to you that's telling and indicative of how hurtful his testimony, and not hurtful in an emotional way to his father, but a non helpful way for their case. That this son who has every reason in the world to want to help his father confirms what the victims have told the police and all of you."

Swearington maintains the latter argument by the prosecutor was improper, because Swearington had proffered that Keyonn, Jr., would testify he (Keyonn, Jr.) had a sexual relationship with Raquel. According to defense counsel's offer of proof, Keyonn, Jr., had told a police officer that Raquel touched him and that he touched her on her butt and vagina. If this testimony had been given, Swearington points out, he would have argued to the jury that Raquel fabricated the charges so she would no longer have to visit Keyonn, Jr., at Swearington's apartment, and she accused the adult Swearington, rather than his son, since Raquel had previously gotten in trouble for talking about having sex with boys in the first and second grade. Because this evidence was legally unavailable to him due to Keyonn, Jr.'s, assertion of his Fifth Amendment rights, Swearington argues, the prosecutor took advantage of this fact by commenting "on the failure of appellant to provide helpful testimony of his son." He claims the prosecutorial misconduct was highly prejudicial in this closely balanced case.

1. Waiver

A defendant usually waives his challenge to prosecutorial misconduct unless he raises it at trial. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Failure to timely object is excused, however, if the objection would have been futile or an admonition would not have cured the harm. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Swearington contends his objection would have been futile and a judicial admonition would not have cured the impact of the prosecutor's statements. We disagree. There was no indication that the trial court would respond inappropriately to an objection, and certainly an admonition that the jury disregard the prosecutor's comments and accept the right of a witness to invoke the Fifth Amendment privilege would have mitigated any potential prejudice arising from those comments.

2. Prosecutor's Comments

Prosecutorial behavior violates the constitution when it is so egregious that it "infects the trial with such unfairness as to make the conviction a denial of due process" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, internal quotation marks omitted), or constitutes a deceptive or reprehensible means of persuading the fact finder. On the other hand, a prosecutor's argument "may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill, supra,* 17 Cal.4th at p. 819, internal quotation marks omitted.) In regard to a witness's assertion of a privilege in particular, a prosecutor may not comment on or argue inferences from the exercise of the privilege, but he may comment on and argue inferences from the evidence in the case. (Evid. Code, § 913 & com.) We must determine whether there is a reasonable likelihood that the jury construed or applied the challenged comments in an improper or erroneous manner, in light of the context of the entire closing argument. (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Lucas* (1995) 12 Cal.4th 415, 475.) Reversal is required if it is "'reasonably probable that a result more favorable to the defendant would have occurred.'" (*People v. Haskett* (1982) 30 Cal.3d 841, 866.)

With these standards in mind, we have reviewed the prosecutor's argument and find no error. The prosecutor did not comment on Keyonn, Jr.'s, silence, but on his testimony, arguing it was unhelpful to Swearington's defense and in fact confirmed the testimony of prosecution witnesses. (Evid. Code, § 913, com.) This characterization of Keyonn, Jr.'s, testimony was not deceptive: although Keyonn, Jr., testified he did not see Swearington "bad touch" Raquel, it was apparent from his testimony that he was asleep when the oral copulation took place. In addition, the prosecutor's comment was not inconsistent with the testimony Keyonn, Jr., purportedly *would* have given had he not invoked his Fifth Amendment rights. There is no indication Keyonn, Jr., was going to rebut the prosecution's witnesses' accounts of the incidents. For example, there is no suggestion Keyonn, Jr., would testify that he was awake when his father purportedly molested Raquel, yet he observed no molestation. Nor was he prepared to testify it was

he, rather than his father, who orally copulated Raquel on August 3 or engaged in sexual intercourse with her on a prior occasion. It cannot be said that the prosecutor was exploiting Keyonn, Jr.'s, assertion of his Fifth Amendment rights in order to mislead the jury.

Swearington claims *People v. Daggett* (1990) 225 Cal.App.3d 751 is closely analogous to the case under review. In *Daggett*, the defendant moved, pursuant to Evidence Code section 782, to introduce (1) evidence of the victim's prior molestation by two older children and (2) evidence of charges pending in juvenile court against the minor victim, alleging he had molested two younger children. The juvenile charges were offered to show the victim's motive for accusing the defendant, whereas evidence of the minor victim's having been molested was offered to explain his ability to describe the acts he accused the defendant of committing. Evidence of the pending juvenile charges was admitted, while evidence of the complaining witness having been the victim of a prior molestation was excluded. At trial, the minor victim admitted that he himself had been charged with molesting two younger children, and that he reported Daggett's molestation sometime after these juvenile charges were filed. The minor proceeded to explicitly describe various acts of sodomy, oral copulation, and sexual touching he ascribed to Daggett. (*Daggett, supra*, at pp. 754-755.) In closing argument, the prosecutor commented that the victim must have learned about this inappropriate sexual behavior from being molested by the defendant. (*Id*. at p. 757.) Had it not been for the trial court's evidentiary ruling, excluding any mention that the complaining witness had previously been subjected to similar acts by others, the defendant would have introduced evidence that would explain how he could have learned such behavior.

The Court of Appeal explained that a minor's accurate description of the sexual acts can create an aura of veracity, "because knowledge of such acts may be unexpected in a child who had not been subjected to them." (*Daggett, supra,* 225 Cal.App.3d at p. 757.) It therefore ruled that the prosecutor improperly took advantage of the trial court's evidentiary ruling, since his argument was the type the excluded evidence was intended to refute. (*Id*. at pp. 757-758.)

Daggett is distinguishable from the matter before us, for two reasons. First, in *Daggett* the defendant's proffered evidence was excluded by a ruling of the court, presumably at the request of the prosecution. By contrast, the sole reason Keyonn Jr.'s testimony was not received was his own assertion of his Fifth Amendment right to silence: neither the court nor the prosecutor contributed to its exclusion. There is, therefore, far less reason to deem the prosecutor's comments unfair. Second, the prosecutor's argument was not the type that Keyonn Jr.'s testimony was intended to refute. It was represented that Keyonn, Jr., would testify that he had touched Raquel on the butt and vagina. As a result of the invocation of his Fifth Amendment right to silence, Keyonn, Jr., did not offer this testimony. The prosecutor's argument did not suggest that Keyonn, Jr., had never touched Raquel sexually, or that Swearington was the only person who ever touched Raquel in a sexual manner, or that Raquel could have learned about these sexual acts only through appellant.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, Swearington claims his trial counsel's failure to raise timely objections deprived him of his constitutional right to the effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show, by a preponderance of evidence: (1) counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) prejudice flowing from counsel's performance or lack thereof. (*Lucas, supra,* 12 Cal.4th at pp. 436-437.) We reverse convictions on the ground of inadequate counsel only if "the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Swearington asserts that his trial counsel had no valid tactical reason for failing to object to CALJIC No. 2.50.01 and failing to object to the prosecutor's comments in closing argument. As to both matters, however, we have concluded there was no error. Accordingly, defense counsel's failure to object at trial, even if it lacked any rational tactical basis (which we do *not* conclude), did not result in any prejudice to appellant.

III. DISPOSITION

The judgment is affirmed.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.